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No. 88-38

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NORTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

MINNESOTA PUBLIC UTILITIES COMMISSION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MINNESOTA COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether the federal issues identified in the Petition for Writ of Certiorari were adequately raised before the state court of appeals.

(2) Whether Petitioner failed to exhaust available state avenues of review of its federal claims.

(3) Whether the identified issues present substantial federal questions.

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JURISDICTION

As petitioner states, jurisdiction is premised on 28 U.S.C. § 1257(3) (1966 and Supp. 1988). However, as shall be fully developed in this Brief in Opposition, jurisdiction to review the identified federal issues is not properly invoked because these issues were neither pressed before nor passed on by the Minnesota Court of Appeals. Additionally, the federal issues presented are insubstantial and do not merit review.

STATEMENT OF THE CASE

This Brief in Opposition is submitted on behalf of respondent Minnesota Public Utilities Commission and intervenor-respondents Minnesota Department of Public Service and the Minnesota Attorney General (hereafter "Respondents").

The Respondents adopt and incorporate the statement of facts contained in the Minnesota Court of Appeals decision, *Minnesota Public Utilities Commission's Initiation of Summary Investigation,* 417 N.W.2d 274 (Minn. App. 1987).

Additionally, however, specific corrections must be made to Northwestern Bell Telephone Company's ("NWB" or "Bell") Statement of the Case. With respect to its appeal to the Minnesota Court of Appeals, NWB did not claim that denial of oral argument was a violation of federal constitutional rights.[1] NWB Brief in C9-87-1297 at 42-46, R A 97-99. Although NWB argued before the Court of Appeals that "due process" required a formal hearing, NWB relied on state statutes and law.[2] NWB Brief in C9-87-1296, at 47-49, R A 48-51. NWB did not raise the preemption claim before the Court of Appeals.

Similarly, NWB's petition for Minnesota Supreme Court review was entirely silent with respect to federal claims.

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[1] In order to permit the Court to fully explore NWB's failure to raise its federal issues below, respondents have included in their appendix copies of NWB's initial briefs before the Minnesota Court of Appeals as well as NWB's Petition for Supreme Court Review. References to Respondents' appendix will be denoted R A and references to the NWB appendix shall be referenced as NWB A.

[2] The only reference to federal law consists of a single statement made in the course of analyzing a state case, *Matter of Haugen,* 278 N.W.2d 75 (1979). During that discussion, NWB stated: "Such basic fairness is guaranteed by the state and federal constitutions." NWB Brief in C9-87-1297 at 46, R A 99.

Instead, only state law claims were pressed. NWB Petition for Supreme Court Review, R A 103. NWB raised its federal issues for the first time before the Minnesota Supreme Court in its Petition for Reconsideration. NWB A-204. That petition, however, did not raise the due process claims now identified and briefed by NWB. Rather, NWB asserted only that denial of oral argument violated due process rights. Here, however, NWB alleges that its due process rights were violated by a failure to hold an evidentiary hearing as well as its oral argument claim. *Id.* NWB A-120.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

As shall be shown, Northwestern Bell Telephone Company's Petition should be denied because: 1) NWB failed to adequately raise before the Minnesota Court of Appeals, the federal issues it relies upon in its petition nor did the Court of Appeals rule on any federal claims; 2) NWB failed to exhaust state avenues of review of its federal claims; and 3) NWB's federal issues are insubstantial and do not warrant U.S. Supreme Court review.

I. NWB DID NOT PRESS ITS FEDERAL ISSUES BELOW.

A. The Standard For Review By Writ Of Certiorari.

The Supreme Court's jurisdiction to review decisions of state courts derives from 28 U.S.C. § 1257 (1966 and Supp. 1988), which provides:

> [F]inal judgments or decrees rendered by the highest court of a state in which a decision may be had, may be reviewed by the Supreme Court as follows: . . . By writ

> of certiorari, where any title, right, privilege or immunity is specially claimed under the Constitution, treaties, or statutes of . . . the United States.

Essentially, this provision has descended from the Judiciary Act of 1789, § 25, Stat. 85.

The Supreme Court established early on that Section 25 of the Judiciary Act provided jurisdiction only over those federal questions which had been both raised and decided in the relevant state court. *Crowell v. Randall*, 10 Pet. 368, 392 (1836); *see also Owings v. Norwoods' Lessee*, 5 Cranch 344 (1809). This principle developed into the rule that a federal question must be pressed or passed on below as a prerequisite to invoking Supreme Court review. *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-36 (1940). That is, either the relevant state court decision must discuss and decide the federal issue or the issue must be raised before that court by the petitioner. Although it is unclear whether the "pressed or passed on below" rule is jurisdictional in nature or merely prudential, *Illinois v. Gates*, 462 U.S. 213, 219-22 (1986), the Supreme Court continues to adhere to the rule that, absent exceptional circumstances, the Court will review by writ of certiorari only those federal questions or issues argued before or expressly decided by the state's court of last resort. *McGoldrick, supra*, 309 U.S. at 434-35.

The federal issues identified by NWB in its petition do not meet this standard. Because the Minnesota Supreme Court denied NWB's petitions for review, NWB seeks a writ of certiorari to the Minnesota Court of Appeals. *See Minneapolis, St. Paul & S.S.M. Ry. Co. v. Rock*, 279 U.S. 410 (1929) (Court of Appeals is the highest state court when state supreme court denies discretionary review). Therefore, whether NWB's alleged federal claim meets the "pressed or passed on

below" rule will be tested by the litigation of these issues before the Court of Appeals. The record demonstrates that NWB cannot meet that standard. The federal issues were neither pressed before nor passed on by that court. First, the Court of Appeals decision does not address the identified federal issues. Second, NWB either wholly failed to raise federal issues before the Court or raised them in a perfunctory and insufficient fashion.

B. The Court Of Appeals Did Not Pass On The Federal Issues.

A thorough reading of the Court of Appeals decision, *In the Matter of the Minnesota Public Utilities Commission's Summary Investigation*, 417 N.W.2d 274 (Minn. App. 1987), NWB A-181, reveals that the federal issues identified by NWB in its petition before this Court were not discussed or ruled upon by the Minnesota Court of Appeals.

In its Petition, NWB lists three federal issues: preemption, due process, and confiscation. In the Court of Appeals' decision there is absolutely no mention of NWB's alleged preemption issue or confiscation. With respect to due process, the opinion does state simply that NWB alleged that Commission procedures violated Northwestern Bell's "constitutional and statutory rights." *Id.* at 278, 283. For example, the Court stated: "Northwestern Bell claims the denial of oral argument before the new Commissioners in 1987 constituted a deprivation of its constitutional and statutory rights." Although the Opinion does not identify whether "constitutional" is used in the state or federal sense, it is clear from the Court's analysis of NWB's claim of improper Commission procedures that it was addressing only state law. *Id.*

Based on the four corners of the opinion, the Court of Appeals did not pass on the alleged federal issues now identi-

fied in NWB's petition. Therefore, NWB cannot invoke Supreme Court jurisdiction on the ground that the Minnesota Court of Appeals actually decided the identified federal issues.

C. NWB Failed To Press Its Federal Issues Before The Minnesota Court Of Appeals.

There is a sound reason why the Court of Appeals failed to address NWB's federal issues: NWB either failed to raise the issues or failed to raise them adequately before the Court of Appeals. In similar situations the Supreme Court has observed:

> [W]hen the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.

Street v. New York, 394 U.S. 576, 582 (1969); and *see Exxon Corp. v. Eagerton,* 462 U.S. 176, 181 n. 3 (1983). That assumption is borne out by the facts of this case.

First, NWB's Briefs on appeal were entirely silent with respect to the preemption issue. This silence is fatal to the reviewability of this issue. Since the Court of Appeals did not address the issue and NWB failed to raise it before that court, there can be no doubt that the preemption issue fails to meet the "pressed or passed on below" standard necessary to invoke Supreme Court jurisdiction.[3]

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[3] The preemption issue was raised before the Commission. NWB A-169. NWB's position was seriously undermined, however, by the testimony of its own witness who requested that the Commission use an equity ratio which did not conform to the debt equity ratios which NWB now claims are required as a matter of federal law. NWB A-148.

According to this Court's standards, the remaining issues identified by NWB in its Petition for Certiorari, procedural due process and confiscation, were inadequately raised by NWB before the Court of Appeals. In order to invoke U.S. Supreme Court jurisdiction, a petitioner must bring the federal claim and the grounds for that claim before the state court with some specificity. In a related jurisdictional context, the Supreme Court has stated: "No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefore be brought to the attention of state courts with fair precision and in due time." *New York ex rel. Bryant v. Zimmerman,* 278 U.S. 63, 67 (1928). If the federal issue is not adequately presented, Supreme Court review cannot be invoked. For example, the Court has rejected petitions where only a mere reference was made to the "Constitution of the United States," *Herndon v. Georgia,* 295 U.S. 411 (1935), or "due process of law," *Bowe v. Scott,* 233 U.S. 658 (1963). Moreover, if a claim is made only that a statute or action denies "constitutional rights," the Supreme Court will assume that the reference was addressed to the state constitution. *New York ex rel. Bryant v. Zimmerman, supra.* The reason federal issues must be adequately raised in the state court is to ensure that Supreme Court jurisdiction is conserved for mature federal issues, and not simply for preliminary, unspecified, and unlitigated federal claims.

Judged by these standards, NWB has failed to adequately raise its federal claims. With respect to the due process issue, in its Brief before the Court of Appeals, NWB failed to claim violation of the federal constitution with any specificity. Rather, NWB vaguely mentioned, in an off-hand manner, "contitutional rights" or "due process." In fact, NWB's discussion of procedural due process included no federal law.

NWB Brief in C7-87-1296, at 46-49, R A 48-51; NWB Brief in C7-87-1297, at 44-46, R A 97-99. Indeed, NWB made none of the arguments below which it now raises in its Petition.[4] Instead of identifying federal constitutional provisions or case authority, NWB relied exclusively on state law with respect to its procedural claims. In the absence of reliance on federal authority, its "claim" should be construed as implicating the state, rather than the federal, constitution. *New York ex rel. Bryant v. Zimmerman, supra.* NWB's inadequate presentation of its "federal" due process claim does not comport with the policies undergirding Supreme Court review.

NWB's presentation of the confiscation issue is similarly deficient. The analysis of confiscation in the regulatory context focuses on the effect of the particular regulatory action on the continuing financial health and integrity of the utility. The operative standards with respect to confiscation were established by the Supreme Court in *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). In that case the Court stated:

> From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the

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[4] It also appears that NWB has altered its procedural claim at every stage of review. Before the Court of Appeals NWB relied on state statutory and case law for its argument that it was improperly denied oral argument. NWB Brief in C7-87-1296, at 46-49, R A 48-51; NWB Brief in C7-87-1297, at 44-46, R A 97-99. NWB's Petition For Supreme Court Review did not allege due process claims. R A 103. In its Petition for Reconsideration in the Minnesota Supreme Court, NWB first argued that denial of oral argument implicated federal law. NWB A-205. Now, for the first time, NWB appears to contend that it should have been accorded a full blown evidentiary hearing before an independent administrative law judge before the redeliberation of its rates by the Commission. Petition at 14.

> business. These include service on the debt and dividends on the stock . . . . By that standard the return to the equity owner should be commensurate with returns on investment in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.

Id. at 603 (citations omitted).

A determination of the type described in *Hope* is factually and legally complex. *See Jersey Central Power and Light v. F.E.R.C.*, 810 F.2d 1168, 1170-72 (D.C. Cir. 1987). Therefore, this type of claim requires in-depth factual support. Yet NWB's presentation of this issue contains no analysis beyond a barren citation of two cases. NWB Brief in C7-87-1296 at 49, R A 51. NWB presented no facts to the Court of Appeals regarding NWB's financial health, nor did it make appropriate citations to the record to support this claim. No court could have analyzed this complex claim based on such a presentation.[5] Supreme Court review should not be wasted on an alleged issue that was treated like a throw-away claim by NWB.

D. Policy Considerations.

The requirement that a federal claim be adequately presented to the state court is not a sterile, formal requirement. Indeed, in the absence of an adequate presentation, the state court will not have the opportunity to address and dispose

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[5] As stated above, the Court of Appeals did not address this claim on the merits. The probable state ground for rejection of this claim is failure to meet its burden of proof. In Minnesota, the burden of proof for any issue in a rate action is always with the utility. *Petition of Continental Telephone Co.*, 389 N.W.2d 910, 915 (Minn. 1986).

of the federal question itself, perhaps foreclosing the necessity of further review. Moreover, an inadequate presentation will result in an inadequate record for ultimate Supreme Court review. These considerations lie at the heart of the requirement that a claim be pressed and passed on before the state's highest court. In this regard, the Court stated in *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1968):

> In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 U.S.C. § 1257, there are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, *O'Connor v. Ohio*, 385 U.S. 92 (1966), they should be given the first opportunity to consider them.

The record in this case provides an inadequate basis for review in the Supreme Court of the identified federal issues. As stated above, conclusory statements concerning "due process" or "confiscation" provide no sound basis for meaningful state court review below nor do they produce a sufficiently narrowed issue for a review by this Court. Instead, the record should contain legal arguments and the facts supporting those arguments. The record here does not. Moreover, the state courts could have resolved these issues on adequate state

grounds if given an opportunity.[6] Because of the inadequate presentation of federal issues, the Minnesota courts were deprived of this opportunity. Indeed, the absence of such a record explains the absence of any discussion of federal issues by the Court of Appeals.

Therefore, in absence of adequate presentations of federal issues and an adequate record for review of those issues, NWB's Petition for a Writ of Certiorari should be denied both on jurisdictional and policy grounds.

II. NWB FAILED TO EXHAUST AVAILABLE STATE AVENUES OF REVIEW.

Northwestern Bell's Petition also should be denied because it failed to exhaust state avenues of appeal on its identified federal claims. Even when certiorari is directed to an intermediate court of appeals, available discretionary review must be pursued to insure that the highest state court has an opportunity to address the federal issues. *Banks v. California,* 395 U.S. 708 (1969); *Benton v. Maryland,* 395 U.S. 784, 786 (1969). If the petitioner fails to use the opportunity to raise federal issues on further appeal, the petitioner will be considered to have waived such issues. *Herndon v. Georgia,* 295 U.S. 441 (1935); *Beatty v. Richardson,* 276 U.S. 599 (1928). Such is the case here.

NWB failed to exhaust available review of its federal claims when it elected to address only state issues in its Petition for Review in the Minnesota Supreme Court. No federal issues were claimed or discussed. *See* Petition for Supreme Court Review, R A 103. Instead, the federal issues which NWB now lists in its Petition for Writ of Certiorari were first

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[6] See fn. 5, *supra.*

presented to the Minnesota Supreme Court in NWB's Petition for Rehearing. NWB A-204-214. Contrary to the allegations contained in NWB's Petition for Writ of Certiorari, at 9 n.1, this presentation of issues on rehearing was not adequate to preserve its federal claims because the Petition for Rehearing failed to meet state procedural requirements for securing a rehearing. *Minn. R. App. P. 140.01.*[7] As a consequence, NWB failed to give the Minnesota Supreme Court a meaningful opportunity to address its alleged federal issues. This failure to seek appropriate review in the state supreme court is, in turn, fatal to NWB's Petition for Certiorari because the failure is considered a waiver of the federal issues. *Herndon, Beatty, supra.*

This result is consistent with the longstanding rule that federal questions first presented to the state's highest court

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[7] Minn. R. App. P. 140.01 provides as follows:

> No petition for rehearing shall be allowed in the Court of Appeals.
>
> A petition for rehearing in the Supreme Court may be filed within 10 days after the filing of the decision or order unless the time is enlarged by order of the Supreme Court within the 10-day period. The petition shall set forth with particularity:
>
> (a) any controlling statute, decision or principle of law; or
>
> (b) any material fact; or
>
> (c) any material question in the case which, in the opinion of the petitioner, the Supreme Court has overlooked, failed to consider, misapplied or misconceived.

NWB's Petition for Rehearing failed to meet the requirements of this section because the issues identified had never been raised before the Supreme Court either by the Court of Appeals opinion or in NWB's original petition for review. Therefore, because of the default in NWB's presentation, these federal issues could not have been overlooked or misapplied by the Supreme Court. In addition, NWB failed to preserve its issues for appeal because it did not press them before the Court of Appeals and in its first petition for review. According to Minnesota law, a party may not raise an issue on appeal not presented to the court below. *Matter of Welfare of K.T.*, 327 N.W.2d 13, 16-17 (Minn. 1982).

in a petition for rehearing come too late to preserve the questions for U.S. Supreme Court review unless the state court actually addresses the federal issues. *Radio Station WOW v. Johnson, Inc.*, 326 U.S. 120, 128 (1945); *American Surety Co. v. Baldwin*, 287 U.S. 156, 162-64 (1932); *Godchaux Co. v. Estopinal*, 251 U.S. 179 (1919); *Consolidated Turnpike Co. v. Norfolk & Ohio R. Co.*, 228 U.S. 326, 334 (1913). If the state supreme court simply refuses the petition, as occurred in this instant case, there is no jurisdiction. *Godchaux Co., supra*, 251 U.S. at 181.

Based upon these standards, it is apparent that NWB's failure to seek meaningful review of its federal claims in the highest available state forum must result in the rejection of its Petition.

III. THE FEDERAL ISSUES RAISED BY NWB ARE INSUBSTANTIAL.

In addition to inadequate litigation in the state courts, NWB's Petition should be rejected because the identified federal issues are insubstantial.

The Supreme Court has determined that insubstantial federal questions are unworthy of review. *E.g. Palmer Oil Co. v. Amerada Corp.*, 343 U.S. 390 (1952). Thus, if an issue is devoid of merit or so explicitly foreclosed by previous decisions that there is no controversy, the Supreme Court will deny review. *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 311 (1902); *see also Zucht v. King*, 260 U.S. 174 (1922). The issues identified by NWB are insubstantial and do not justify U.S. Supreme Court review.

A. NWB's Preemption Claim Fails Because There Is No Conflict Between The Applicable State And Federal Law.

NWB asserts that the Commission's decision on a capital structure to be used for ratemaking purposes was preempted by a federal court decision, *United States v. American Telephone and Telegraph Co.*, 552 F.Supp. 131 (D.D.C. 1982), involving the breakup of AT&T (the divestiture of AT&T from its local Bell Telephone companies). NWB is incorrect.

As NWB states in its Petition, at 9, in subject matter areas where regulation is shared between the federal government and the states, such as utility regulation, federal law preempts state law only when an actual conflict between the two exists. *See Michigan Canners & Freezers Ass'n. Inc. v. Agricultural Marketing and Bargaining Board*, 467 U.S. 461 (1984). NWB's preemption issue is insubstantial because there is simply no conflict between the state law (the Commission's Order After Redeliberation), and the federal law (the federal district court's decision breaking up AT&T), *United States v. American Telephone and Telegraph Co., supra.*

The purposes of the federal district court decision and the Commission order are so divergent that no conflict exists here. On one hand, the district court's decision (referred to as the Modified Final Judgment "MFJ") authorized a capital structure for AT&T and the local Bell telephone companies for the purposes of divestiture only, and not for ratemaking purposes. The district court's main concern in ordering a capital structure was to assure that the actual capital structure of the newly created local Bell telephone companies conformed to the assets actually transferred to the new companies. Moreover, an actual capital structure was simply a necessary con-

comitant of divestiture: a newly minted corporation must have a capital structure.

The divestiture decision manifested no intent to preempt state regulation. Indeed, the court specifically denied that its actions in the case were intended to bind state ratemaking, stating: "This decision *of course* in no way affects the authority of regulators to use a different standard in valuing assets within their jurisdiction for ratemaking purposes." *Id.* at 205, fn. 312 (emphasis supplied). See also *id.* at 203, fn. 303. In light of the district court's express intention in the divestiture case not to preempt state regulation, the decision should be accorded no preemptive effect on the Commission's Order involved here.

The purpose of the Minnesota Commission's order, in contrast, was ratemaking not effectuating divestiture. In their order the Commission imputed a *hypothetical* capital structure for ratemaking purposes only. NWB A-165-66. The imputation of this *hypothetical* structure did not alter NWB's actual capital structure nor did it interfere in any way with the divestiture ordered by the district court in its Modified Final Judgment. Consequently, NWB is able to have the capital structure ordered by the district court for divestiture purposes while its rates were calculated using a hypothetical capital structure.

NWB attempts to bolster its preemption claim by referencing this Court's most recent preemption decision, *Mississippi Power and Light v. Mississippi*, 56 U.S.L.W. 4751 (No. 86-1970, June 24, 1988). NWB Petition at 11. However, that case has no application here. In *Mississippi Power and Light*, the state commission refused to accept FERC-approved wholesale rates when it established retail rates for the utility. The conflict between the FERC action and the state regulation

arose because both involved ratemaking. Additionally, the FERC intended preemptive effect. As the Supreme Court observed the FERC's order was "the result of a careful balancing of the state and federal interests involved" and that it had paid "careful heed to the impact its decision would have on the states." *Id.* at 4754.

Therefore, the Commission's imputation of a hypothetical structure for ratemaking purposes did not result in a conflict with the MFJ. Significantly, nowhere in the Petition does NWB state that an actual conflict exists. In the absence of a conflict, the preemption argument is foreclosed.

B. NWB's Procedural Due Process Issue Is Routine And Meritless.

NWB alleges that it was denied due process in the handling of the proceedings which resulted in a reopening of an earlier rate case. This procedural claim is insubstantial because it is devoid of merit.

As stated by NWB, the Supreme Court's decision in *Parratt v. Taylor*, 451 U.S. 527 (1981) *overruled in part, Daniels v. Williams*, 474 U.S. 327, 330 (1986) provides the operative standard. In *Parratt*, the Court stated:

> Our past cases mandate that some kind of hearing is required at some time before a State finally deprives a person of his property interests. The fundamental requirement of due process is the opportunity to be heard and it is an "opportunity which must be granted at a meaningful time and in a meaningful manner."

451 U.S. at 540, quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *see also Market Street Railway Co. v. Railroad Commission*, 324 U.S. 548, 558 (1945) (notice and hearing required).

The best way to demonstrate that the above procedural standard has been met is to identify the procedural safeguards which occurred in the proceedings below. Before deliberating whether NWB had committed fraud on the Commission, the Commission issued, on October 3, 1986, its *Order Establishing Procedures and Soliciting Briefs,* Docket C1-86-177. That Order requested that the various parties address identified issues involving the merits of whether NWB's earlier 1983 rate case should be redeliberated. NWB A-113. On October 23, 1986 NWB filed comments, as did other interested parties. On November 3, NWB filed Reply Comments. Oral Argument was held on November 6, 1986 and NWB participated. The Commission determined that NWB had committed fraud only after NWB had been accorded the opportunity to meet and contest the issue.

Once the Commission determined that NWB committed fraud on the Commission and vacated the original order, the Commission turned to the proper method for redeliberating the case. Because no intervenor had claimed that the prior evidentiary hearing, which had been conducted by an independent Administrative Law Judge ("ALJ"), had been tainted by NWB conduct, the Commission determined that the most administratively efficient method of redeliberating the case was to begin with the record developed before the ALJ. NWB A-141. Because the earlier evidentiary record was used, NWB enjoyed all the procedural protections provided by the prior administrative procedure, including the opportunity to present issues, cross-examine witnesses and orally argue before the Commission.

NWB was not accorded another evidentiary hearing replete with oral argument for sound reasons. First, a further evidentiary hearing was simply not necessary because the earlier

record adequately reflected the litigated issues and it was free of taint. Second, a further hearing would have rewarded NWB for committing fraud on the Commission. Finally, this procedure is in accord with state law. Indeed, in *Petition of Northern States Power Co.*, 414 N.W.2d 383 (Minn. 1987), the Minnesota Supreme Court ruled that redeliberation on the existing record was the appropriate remedy for correcting tainted Commission deliberations. Therefore, under the unique circumstances of this case, involving fraud on the tribunal, redeliberation on the existing record was the most efficient and fair procedure.[8]

Based on the history of the case, NWB enjoyed the kind of notice and hearing necessary to comport with federal strictures of due process. Moreover, in view of the unique history of this case, involving vacation and re-opening of a rate case because of fraud on the Commission, no substantial federal question exists.

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[8] It is because fraud provides a unique exception to normal administrative procedure that NWB's allegations in its petition carry no weight. For example, NWB claims that "To hold to the contrary would allow a utilities Commission to reduce utility rates without a meaningful hearing as long as a hearing were held at the prior rate determination." Petition at 16. NWB is incorrect because the procedure of redeliberating on the existing record was used only because NWB had committed fraud on the Commission. As a result, routine rate cases will continue to be handled pursuant to *Minn. Stat.* § 237.075 (1986) which provides for administrative hearings before independent law judges.

C. The Confiscation Claim Is Completely Unsupported And Frivolous.

As discussed above, when NWB presented to the Minnesota Court of Appeals its claim that the capital structure granted to it by the Commission results in confiscation, it did so without the support of facts and unencumbered by citations to the record. In the absence of any factual support for this type of complex claim, the confiscation issue must be deemed devoid of merit and, therefore, insubstantial.

Instead of factually supporting its confiscation claim, NWB baldly equated the use of a hypothetical capital structure with confiscation as a matter of law. NWB Brief in C9-87-1296 at 49, R A 51. If NWB is correct, any application of a hypothetical capital structure would result in confiscation. This legal claim is frivolous in light of the settled regulatory practice of approving hypothetical capital structures both in federal and state regulatory jurisdictions. *See Communication Satellite Corp. v. Federal Communications Commission,* 611 F.2d 883 (D.C. Cir. 1977); *General Telephone Company of the Northwest Inc. v. Idaho Public Utilities Commission,* 109 Idaho 942, 712 P.2d 643 (1986) (survey of jurisdictions adopting hypothetical capital structures).

The simplistic equation of a hypothetical capital structure with confiscation demonstrates that this issue is devoid of merit. Moreover, because NWB's confiscation claim merely alleges confiscation without the type of supporting evidence normally submitted, *see e.g. Jersey Central Power and Light v. F.E.R.C.,* 810 F.2d 1168, 1170-1172 (D.C. Cir. 1987), this alleged issue is devoid of merit on a factual basis as well.

CONCLUSION

For the many reasons discussed above, Northwestern Bell's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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